

What You Need To Know About Land Use Regulations



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Presenters:

Mary Ann Rossi, Esq.

Jane M. Shields, Esq.

Brendan P. Burke, Esq.

Brian L. Nagle, Esq.

Mary Ann Rossi: Good morning. My name is Mary Ann Rossi. I am a member of the Land Use Group at MacElree Harvey. With me up here are the other members of the Land Use Group. We have Jane Shields, Brendan Burke and Brian Nagle. We're glad to be here and have the opportunity to talk with you this morning. We are also pleased to be coordinating a seminar with the Greater West Chester Chamber of Commerce and West Chester University. I think you'll agree that this is a fine facility.

Our purpose this morning is not to give you legal advice about any specific matter, but to give you a fact pattern and some examples of the kinds of issues that come up when you want to develop a property, and it's more to prevent you from having surprises in a real estate development project because if you happen upon an issue late in the process, it can add time and it can add money to your project. What I would like you to imagine is that you are our client and that you had met with us a couple of weeks ago, and that you had told us what it is you want to do, and you asked for our advice on what you want to do. And, what you want to do is, you have found a property in Turk's Head Borough and you've fallen in love with it. It seems to you to be the perfect place to put the bed and breakfast that you've always wanted to operate. And you wanted your bed and breakfast to be more than just a bed and breakfast. You also wanted it to be a venue for weddings and other large gatherings and you'll have to do some catering. The property that you found is a former mill, called the Initiative Mill in Turk's Head Borough. It's on about ten acres and there is a stream that runs through the property. There is a pond near the stream and you would very much like to make that pond an amenity for your development. So, you came to me and the Land Use Team of MacElree Harvey and you said, this is what I want to do, tell me what's going to happen. Now, one thing I should tell you is that it is very rare that you come and meet with four lawyers for a land use project. I don't want you go get the idea that all four of us are going to meet with you. But for purposes of this morning, let's assume that you wanted all four of us to look at these problems. But I will say when you do retain MacElree Harvey, you do have the benefit of the experience and knowledge of all four of us.

We've identified certain issues that we want to talk with you about and I want you to image that this is your second meeting with us and we are now going to give you advice. And just like in a real attorney- client meeting, we want you to break in with questions if at any time along the

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way you have a question about the advice you'll be getting. So, with that, I'm going to turn the matter over to Brendan and ask Brendan to address the most fundamental question in your fact pattern and that is, will the zoning ordinance allow you to have a bed and breakfast on the property with which you have fallen in love?

Brendan Burke: Good morning everyone. I'm Brendan Burke. I'm going to remain seated at the table and I hope you don't mind, and I hope you can see and hear. But, as Mary Ann said, the most critical thing is the terms of the zoning ordinance. It really is the starting point for any discussion as to what you want to do. I know in seeing some of you and seeing the list of attendees, we have a pretty diverse group here in terms of their experience with the land use and zoning process. But, I do think it bears about five or ten minutes of me going over the layout of a zoning ordinance so you can know the issues that we're discussing in greater detail today, and also to give you a bit of a flavor for the things you may encounter. I apologize if some of this is very basic for some of you; it may not be for others. If I see you all reading a newspaper and checking your watches, I'll know it's time to move on and get off this topic and get into the meat of the matter. But, really the first thing you need to look at in all cases is the zoning ordinance.

The purpose of a zoning ordinance is to coordinate development within a municipality in an organized and sustainable fashion, the goal of which is to protect public health, safety, morals and welfare. You hear those phrases often repeated. The zoning ordinance sets out to do that by improving or maintaining the aesthetics of the community - the way things look. The protection of natural or historic resources. Control population density where the majority of people will be living and operating from and a corollary of that, of course, is traffic. We all have sat in traffic jams and said, who ever designed this layout where there's 40,000 of us going the same direction at the same time in the morning? Another key factor of the zoning ordinance is the creation of a Zoning Hearing Board. The municipal governing body creates a Zoning Hearing Board which hears and determines applications made to the municipality. It resolves any disputes that may arise from it, and is responsible for the enforcement of the terms of the zoning ordinance.

To meet the goals of the zoning ordinance, normally what happens is a municipal area, township or borough, is divided into zoning districts, and, I'm sure you may have heard, well, what's the zoning of the property or seen the real estate sign saying, Zone C-2. And, depending on the size of the municipality, it will normally be broken down into, for example, one or more residential districts, a commercial district, perhaps an industrial or professional district, where certain uses are clustered or kept together to preserve that community sense and the logical flow of business, commerce and residential living within the community.

We should talk about how a zoning ordinance is laid out. Each zoning district will normally have several subheadings in the ordinance and the first of which is normally uses that are a permitted use. Certain uses in certain zoning districts are permitted or, in fact, should be

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encouraged. For example, in a residential zoning district, it may permit single-family dwellings on a lot of a certain size. But, also a different type of permitted use is what we call a conditional use. A conditional use is a different type of permitted use where the municipal governing body has determined this is acceptable for this area or this zoning district, but it requires a little bit of special attention and there are certain conditions placed upon it. Hence the term "conditional use." After a public hearing, the governing body will attach certain conditions to your use of the property in this manner to ensure that the goals and the purposes of that zoning district and the zoning ordinance are met.

Very similar to a conditional use is another type of permitted use called a special exception. Again, it's a permitted use, but in this case the Zoning Hearing Board attaches certain conditions or may attach certain conditions to ensure that the goals and the purposes of the zoning ordinance are met. So, these types of uses fall under the use regulations category of the ordinance.

The nuts and bolts of the ordinance, though, are called the area and bulk regulations. You are allowed to have something on a lot of two acres or only 40% of the lot may be covered, or you have to have 20 foot set-backs from each of the property lines. Again, these are the nuts and bolts, the real regulations that help to ensure the public health, safety, welfare and morals of that specific area of the zoning district. Similar to that are design standards. Again, it's something that the zoning ordinance includes to ensure that the use and many times appearance of the use in that zoning district are appropriate. A caveat that I've learned is the definition section of the zoning ordinance is vital because it really does lay out many of the issues you are going to face as a landowner or a developer who is seeking to develop a certain piece of property.

The very first question that I would ask as a landowner if I went to a lawyer, if I went to an architect, an engineer, and I had this proposal, would be, what does the zoning ordinance say, because that really determines the issues you will have, whether it be before the Zoning Hearing Board, whether it be obstacles you may face or things you need to overcome. It's going to come from the terms of the zoning ordinance. If there is one thing that you take today from I've told you or what I've spoken to you about, it's please use that reference -- that has to be the starting point. The definition section will often let you know, well, gee, my proposal doesn't quite fit under that definition, how am I going to be able to get around that? Obviously, in a zoning ordinance not every contingency, not every term can be defined. That is where sometimes a skillful advocate on your behalf can really help you, where you can draw by analogy from other parts of the ordinance, or by common use, or by experience in the area, in the community where this definition is to be applied.

Now, in our fact pattern you have a former manufacturing use of the property that at the time it started and was in use, the zoning ordinance did not prohibit it. We would call this a lawful non-conformity. The reason it is non-conforming is subsequent to that use, a zoning ordinance or part of it has been enacted that renders it non-compliant with the current zoning. The reason

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this is an important issue for us is having a lawful non-conformity creates in the property owner a vested property right. That vested property right can only be taken away from you or abrogated in certain circumstances. The reason that a lawful non-conformity applies to this fact pattern is we are seeking to change the use from what was there before into what we want to do - the bed and breakfast. To do so in this circumstance, we had to show that what existed there at the time of its last use was lawful. The only way a lawful non-conforming use may be abrogated or destroyed is if it's determined to be a public nuisance, or if it's been extinguished by eminent domain. Eminent domain and a public nuisance in this instance don't really apply. You don't have that many facts about it, so the real issue is abandonment. If you look at your fact pattern, you'll see that the manufacturing business moved out one year ago and the property has been vacant since that time. The zoning ordinance may provide a certain time period in its terms where a presumption of abandonment may occur. For example, if a property is left vacant normally for six months or a year, depending on the zoning ordinance, a presumption will arise that this has been abandoned. I can't stress enough in this circumstance how difficult it is for a township to say, your non-conforming use has been abandoned. It is almost oxymoronic because you must prove two things. I shouldn't say you. The township who is trying to establish that this non-conforming use has been abandoned, they must prove two things, the first of which is the landowner's intent to have abandoned that use. Secondly, the landowner then took steps or actions consistent with that intention to abandon it. As you might imagine, it's pretty difficult for a township to prove the mindset of a landowner saying, absolutely, I have a vested right in this property, I'm just going to wash it away. I don't care about it. That's it. Many things can prevent this presumption from actually being found to be true. For example, if someone is actively marketing the property for a certain amount of time, if you're doing anything to maintain the property, they're not going to find that you've abandoned it. So, it really, really very rarely occurs because the burden on the township is very high. One of the hot issues, and I've come across it twice in the past six months in terms of non-conforming uses, is abandonment by reconstruction. Many times these older uses, the buildings become a little bit rundown or they need to be updated and what happens is the property owner will say, I'm basically going to take the building down and rebuild it, because business necessity calls for it, just the aesthetic look of the building calls for it, and it just needs to be done in terms of maintenance and upkeep. Courts have permitted landowners to completely demolish these non-conforming structures and replace them with a new non-conforming structure provided it is of the same type. The case law says "of the same type." Well, obviously, what's of the same type? Again, these are the issues you'll be dealing with because a same type of building may be, well, it looks the same or it's put to the same use. There are different issues, but basically you are permitted to continue this non-conformity of a building of the same type. An example was the Pennsylvania Supreme Court held that a golf course which had a lawfully non-conforming outbuilding, I think it was a shed or maybe a golf cart shed, and they basically took it to the ground and built it back up again because it was

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dilapidated. I think the public policy there is let's encourage landowners to take care of their property, take care and maintain things, and not create the situation where this vested right will be taken away or even questioned. Because this is a vested property right, the property owner, particularly in the event of a business, has the right not only to maintain it and continue it, but as business necessity requires, to expand it. For example, you may have a small grocery stand or a small farm stand and competition necessitates that you expand and get a little bit bigger. And that's your right to do so because you can't pigeon-hole people or shoehorn people into this because they have a right to continue and expand business as necessity requires. The zoning ordinance may place specific requirements regarding attempts to extend, replace or enlarge a non-conforming use. The building itself may be non-conforming - perhaps it doesn't meet the setbacks. Perhaps it's a non-conforming sign that no longer complies with the zoning ordinance. All of these things may be lawful non-conformities. In most circumstances, a municipality will require a special exception hearing or a conditional use hearing if you intend to extend or enlarge or change in any material way this lawful non-conformity. That's what we talked about before. They want to see what's there to make sure it's compliant with the ordinance as much as possible and that it is in-line with the zoning district you're in and, again, the buzz words of public health, safety, welfare, morals. On the personal side, I think morals is an interesting part, but we don't have enough time today and you don't want to hear me rant about that.

Based upon our fact pattern, again, the real issue is whether the property being vacant for one year constitutes an abandonment. Of course, the zoning ordinance in this Borough of Turks Head would provide a timeframe we're talking about in terms of giving rise to the presumption of abandonment, but I think, again, it's very, very difficult for the township to prove you've abandoned it and you will likely be able to continue this lawful non-conformity.

But our fact pattern has a twist in it, and the twist it throws in is you're not trying to put a manufacturing facility back on this lovely Chester County property, you're trying to put a bed and breakfast and catering facility. Again, if you intend to extend, change or enlarge the lawful non-conformity, you're likely going to have to have a special exception or conditional use hearing just to make sure that this intended use is no more detrimental, it has to be less impactful than the prior non-conformity. You say, what's less impactful? How do we know the difference? The things that a municipal governing body or a Zoning Hearing Board are going to look at in terms of impact are things such as traffic pattern and traffic flow, water consumption. Things that will impact the community around and determine if it's any more detrimental to the neighborhood than was there before. Now, obviously, I'm a little partial to the fact pattern, so I'm going to say, this was a manufacturing facility in use yeas ago, approximately one year ago, this is a lovely bed and breakfast who may have some people coming in and out in cars and vehicles, but certainly it's going to be less impactful in a negative way on the surrounding communities than would this manufacturing facility. This comes up more than you may think. Here, in Chester County, in the lovely Brandywine Valley, I'm sure you see lots and lots of old

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buildings and think, oh, I could really do something with that. Or maybe an old lot and say, gee, why has no one got in there and put a grocery store, a gas station or something in there? It happens quite frequently because we have so many of these older buildings and older uses and older structures that predated the enactment of many of our modern or current zoning ordinances. Because that happens, we are often called upon to speak with clients who say almost exactly what's happened here. Hey, you know that old farmer Joe property over there? I know it's been a farm stand forever. Maybe I could put like a one-story doctor office in there. The question always goes back to what does the zoning ordinance say. Let's talk about the impacts that are there and see what we can do. Because of so many of these older properties and buildings and structures throughout Chester County, another issue comes up and Jane Shields is going to discuss that with you now. That issue is, is this a historic building? Many of them by virtue of their age, location, William Penn slept there, George Washington had a dinner there, are historic resources and many municipalities have made a determination that these resources, for good reason, are deserving of protection and other considerations. So, once you start with the ordinance, sometimes you end with the ordinance, in the discussion of "Can I do this here?"

I see a question.

Question: Could you please clarify the difference between conditional use and special exception here?

Brendan Burke: Sure. They are similar. A conditional use is one that you'll have a hearing before the local municipal governing body. For example, the Board of Supervisors would have jurisdiction to make those determinations, to attach conditions to the proposed use. They are almost cousins, the special exception, however, is before the Zoning Hearing Board. A special exception actually is a little bit tighter and there is less room for negotiation or dealing with a municipality than there would be in the conditional use process, but it basically involves the same thing. It's a use that has been designated by the ordinance as permitted, but it's permitted under certain circumstances and the real distinction is which body will make this determination. Conditional use is the governing body of the township, Board of Supervisors, versus the Zoning Hearing Board.

Jane Shields: You'll notice Brendan didn't really tell you how he is going to get your bed and breakfast approved because it's not going to be easy.

Brendan Burke: I could do it.

Jane Shields: Once you begin this land development process you are in a thicket of permits. Some of those permits deal with historic and archeological resources that may exist on a

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property, but to give you an idea of what a thicket of permits there are, I couldn't resist printing out part of this DEP's Guide to Permits. The guide is 192 pages long. So, there's quite a bit involved there and part of this will be triggered, you'll hear more from Mary Ann about this, by water issues and sewage issues. You're going to have to file a permit application with DEP to get anything done really.

Once you enter that permit application process, there are a couple of things that are part of that application process that would trigger an inquiry into an historic property. You should be aware there are several different layers of recognition of historic properties or those of archeological significance. On the federal level, how many of you have heard of the designation that a building is in the National Register of Historic Places? Seen some of those plaques? That's a federal designation and it applies usually to individual structures or places, and it's a process that people go through to get the structure approved. No indication here that has happened, so you don't have to deal with that particular level of complexity.

There can also be designations of historic districts and those are not visible on the ground necessarily. There might be a plaque in the neighborhood that says, this is an historic district, but you wouldn't necessarily know it. You're going to have to do some digging to find that out. There can be, again at the federal level, an historic district, but more often here in Pennsylvania you will find that you're in the state level where you're going to be making an application to the Pennsylvania Historical and Museum Commission, and there will be a state designation of historic structure or historic district. That's governed by a particular statute known of all things as the History Code. It's part of Pennsylvania law, which created the Pennsylvania Historical Museum Commission.

We don't see that commission here very much, but Chester County has a Historic Preservation Officer, so there is someone locally who is involved at the county level with these issues. I will tell you that this person takes an active interest in any historic structure that is around. There can be a process whereby a municipality can go through the process of designating an area a historic district, but generally a historic structure is going to be a voluntary act by the landowner to make that structure historic. But the Historic District can be created without necessarily the cooperation of all the people in it. If too many object, it doesn't happen. But, for example, you could be the owner of this structure and it could be in an area where, because it's a manufacturing facility, your property would be included or excluded from that Historic District. So, sometimes it can happen that properties can be designated historic without the consent of the owner.

You also have the local level. You'll find in most zoning ordinances in Chester County a provision regarding historic resources and often there are very busy historic commissions at the local level, which have gone out and people have invested a lot of volunteer time and energy in determining what are the local structures and places of historic interest. And there are manufacturing facilities that are on some of these local lists of historic resources.

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So, you have a couple of different stops, but probably your first stop is going to be again the zoning ordinance, which would say historic structure, and then have some regulations about it. The regulations generally at the state and federal level involve facades mostly and what you can do to the interior of structures. Have any of you had to deal with a HARB? You? It was a bad experience wasn't it? HARBs are Historical Architectural Review Boards, generally go hand-in-glove with the designation of Historic Districts or historic structures under a local ordinance. Because the governing body doesn't want to have to review issues of facades, demolition permits and the like, they create a HARB, which they are permitted to do under state law, and usually there's someone on there who has some knowledge of these issues. Usually there's an architect on the Board. Are any of you This Old House fans and seen any of their HARB sessions? It's a process, a dialog process with this Board as to what you can do in terms of what it looks like, the changes that have to be made to update the structure, and things of that nature. It can be very involved and take time.

What we're all talking about today, it's going to be things that will take time. Changing uses, historic structures, hazardous waste issues, flood plain issues - all involve time and analysis. And, while you wouldn't see this, as Mary Ann said, all of us together in one or your first visits, we all might be consulted in the process at some point because of the different issues that arise.

The power of the Pennsylvania Historic and Museum Commission comes under this History Code and part of it is triggered under a small provision that says, it is to coordinate and comment upon activities of public officials, that would be governing bodies reviewing zoning actions, affecting historic resources and preservation activities. The Pennsylvania Historic and Museum Commission will review any application for any permit. Now, while that commission is only an advisory body, again it is something that can take a great deal of your time because there is a cultural resources notice that would accompany any application to DEP, such as you need to hook up to the public sewer or you're going to have an on-site sewage system. You're going to have to apply to DEP under Act 537. Along with that will come this notice.

PMHC has actually tried to make things a little easier for people to understand what's going on. They even have a flow chart that's part of their permit application these days, so you have some idea. Applicant submits notice. Is this a significant piece? Now, under our scenario, we're not sure if it is or not. It may be. It probably is. It's probably of importance locally too, because of the piece of manufacturing history that it represents. You're probably going to get a significant response. This is where the first cotton manufacturer in Chester County did his work. Then there is a survey that has to be done. Now, the Historic Commission does the survey. It pays for the survey, but the applicant must allow the Pennsylvania Historical and Museum Commission on the property if you're applying for a permit, so you're opening up the land to this process. Now, the good thing is the Commission only has 90 days to do it. The Commission bears the cost, but in the winter they get an added period of time because of weather conditions. Then there's the question, is there more work that needs to be done, so it's a multi-stage, really a three-stage level of scrutiny by the Pennsylvania Historical and Museum

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Commission. The whole process will consume six months, easily, if this place is of historic interest. So, you're going to need a consult probably with someone who is a specialist in this area so you can at least begin this process and try to spoon-feed to the state as much information as they're going to need. At least they will know that you've been attentive and you'll have someone who can speak their language to work with them.

We think of historic structures as triggering this sort of scrutiny, but it's also archeological resources. So, it may be important on this property, what's not visible or what may no longer be visible. Maybe there was a mill race that is now mostly deteriorated that may be of great interest and may require a dig. There are also other resources that will trigger scrutiny.

There's another piece of paper that has to be submitted with the permit application titled the Municipal Request for Pennsylvania Natural Diversity Inventory. How many of you have heard of bog turtles? Bog turtles will slow a project down, if it's potentially bog turtle habitat, because the secretive little critters only come out about six weeks a year, something like that. April, into May maybe; depends on the weather. And they can only be looked for then. If you have the misfortune of having a property that has partly prime bog turtle habitat, you're looking at a year because you've got to look for those little critters at the right time. So, if your timing is off, you're out of luck. You're going to have to wait until the proper field work can be done.

It can also be such things as wild flowers. There is a particular endangered species of wildflower here in Chester County and, again, if you have that on your land - and believe me they know where a lot of these things are and you may not because they don't put any flags out for them, and that's another whole issue. They keep a lot of this information quite secretive because they don't want those who would trade in exotic species, plant and animal, to find them. So, you send this request in and they'll say yes or no, but again it's going to be a dialogue process.

Question: How in the world would you ever make a decision as to whether or not to buy a property? You buy it and then you find out a year down the road that this can happen?

Jane Shields: You've got to figure out how much risk you are willing to bear and also take a look at the property to see, for example, if you have flood plain issues, and Mary Ann will go into that, that's a red flag that a whole lot of other things are going to accompany the land. But, you do need to look at these issues of hazardous waste, flood plain, historic resources. If you have any of these involved, it's going to be a longer process and probably you should be careful not to jump at the property you've fallen in love with and pay top dollar.

Question: Do you list all the potentials that may cause us problems. How do you advise the client - move forward on this or...?

Jane Shields: It's a business decision for them whether they will move forward.

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Mary Ann Rossi: It would not be unusual necessarily with property like this to have a contingency that says a year. In other words, this property in our fact pattern has been on the market, you've been looking at it for a year and the people want to sell it. If you say to them, we can go one of two ways. You're either going to discount the purchase price because I have all these issues that have been pointed out to me by my attorney, or you're going to give me a year to analyze the property. And it depends on how anxious the seller is. I think we would certainly advise you not to purchase this property without a good long contingency period.

Jane Shields: One of the other contingencies is it was a manufacturing facility, and that raises a whole host of other issues Brian Nagle is going to talk about.

Brian Nagle: Good morning. Contamination is indeed often an issue with re-use of a property, especially where there's been manufacturing on that property, the property that you've identified as the property you may want to potentially develop or use for a project. One of the surprises you really don't want to face is CERCLA liability. You may have heard of CERCLA; you may not have. You may have heard of Superfund. That's liability that's imposed, under CERCLA, which is a federal statute, the Comprehensive Environmental Response Compensation Liability Act. That Act imposes liability on owners of property that is contaminated. If you own the property, that's enough. You don't have to be at fault and you don't have to have caused the contamination on the property. In this case you already know that there is contamination on the property based on the fact pattern that you have. So at the outset we know we have to make an assessment knowing that there is contamination on the property. In any case with re-use, that is an issue that you're going to look at to determine whether it has contamination, but in this case we already know that there is. The liability is broad. Sweeping liability on the owner, so you have to make an assessment of the property at the outset before you purchase it, and it's part of that process that could take a year and you can make it part of the contingency of your agreement to buy the property. You usually cannot count on those actually at fault for causing the contamination. In other words, on the property in the subject case there was contamination as a result of the manufacturing facility that was there. You had nothing to do with it. You can possibly identify the prior owners, and it's provided for in CERCLA that you can make a claim against them. However, it is very difficult to make a successful claim against those who caused the contamination of the property.

Jane Shields: Why?

Brian Nagle: In some cases they're gone. The entity that owned the property is wound-up, the corporation or limited partnership or whatever it may have been that owned the property no longer exists. Therefore, even if you find them, you can't get to them. If you find them and you

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think you may be able to get to them, it is a very expensive process to go after them, so that's why it's difficult.

One of the assessments that you have to make under CERCLA, under the Act, is before you purchase the property is the recommendation certainly in doing that, is to make what they call the all appropriate inquiry test. Once you are the owner and the federal government, for example, makes the determination that your property is a Superfund site, they will look at whether you had reason to know that there was contamination on the property when you bought it. And in determining whether or not you had reason to know, the federal government looks at a laundry list of items and the process that you went through, similar to the due diligence process, before you bought the property. You have to make an investigation into the prior ownership and the prior uses of the property. Here, we know there was manufacturing and that there was contamination, so certainly you are on the hook to make a very diligent inquiry in this case into the contamination on the property. Your inquiry must be consistent with good commercial practices and customary practices. That's part of the standard that's been somewhat of a gray area. There's extensive case law on that, but it's an assessment that you can make. Mostly the all appropriate inquiry is establishing that after you're the owner of the property, you can assert the innocent landowner defense. In other words, you looked at the property, you identified it as a property that you'd like to use for a project, and you made all the inquiries that you needed to make so that you do have a defense if eventually the federal government, for example, determines that it is a Superfund site, and that is if the contamination is extensive enough that it constitutes a Superfund site under the Act, under CERCLA. Now, part of the investigation in your assessment of the property is an environmental assessment survey or environmental site assessment. There are essentially two types of assessments that you would make in the beginning - a Phase I environmental site assessment or a Phase II environmental site assessment. In this case, you know you have contamination and you may go directly to making a Phase II environmental site assessment. A Phase I environmental site assessment, both, of course, are done by an environmental professional. The Phase I environmental site assessment evaluates environmental conditions on the property that could give rise to the liability under CERCLA. It typically includes investigation into the records of the federal and state agency that track contamination on property and, frankly, track all sorts of things with regard to the property. So the Phase I will include a review of documents from various federal and state agencies to determine what type of factors have already been identified with regard to the property you are potentially going to purchase.

There is also a physical investigation that is part of the Phase I process. There is a physical investigation for Phase I and Phase II. The Phase I investigation is less intensive. It does include water testing, geology, topography, but it's not as an extensive investigation as the Phase II assessment. In fact, a Phase I site assessment will not really reveal the extent of the contamination on the property, so in this case you already know there's contamination, there are other factors that we would review with you and you would make a determination as to whether

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or not you want to go directly to the Phase II assessment because, of course, you're going to need to know what the potential costs are.

A Phase II environmental site assessment will give you, of course, the more detailed picture of the property, and you're going to need a credible and experienced environmental firm to do a Phase II assessment. The downfall of the Phase II is expense and time, however, it may not compare to the expense and time that it's going to cost you if you don't do it and then find some serious problem later on after you've bought the property, after you've made the decision and you have the sense that you're going to be able to move forward with your project.

Sometimes a site assessment will result in a finding that there is not contamination that's extensive enough to be considered Superfund or CERCLA type contamination that is that it brings you under the purview of that statute.

The other statute that applies, that we consider, in a situation like this where we're looking at contamination is the Brownfield Revitalization and Environmental Restoration Act or Brownfield Act. What the federal government did was in 1980, I believe it was, they enacted CERCLA and the initial process was identifying contaminated sites throughout the United States. And there really wasn't much room for escaping liability under CERCLA and, therefore, there really wasn't much action with regard to redevelopment. Of course, redevelopment or reuse of property that is contaminated is good policy. And that's always been the thought and the sense of the public and government officials alike. Notwithstanding that, it just didn't really happen in the initial years. Later there were amendments to the CERCLA Act SARA and, of course, the Brownfield Revitalization. For Pennsylvanians in particular the Brownfield Revitalization effort has been great and the Commonwealth of Pennsylvania has made efforts to make it easier for developers and property owners to purchase and actually use the sites that have been contaminated by, in our case, manufacturing. The good thing is when you have a contaminated property, you're going to probably get a less expensive cost literally for the purchase. Additionally, under the Brownfield Revitalization Act and under Pennsylvania Brownfield law there are initiatives, grants and funding that are available and also tax benefits are available.

Question: I didn't mean to interrupt. Just on disclosure. I have heard for example the Northbrook Orchards was developed and had six to twelve inches of arsenic and the developer, when they sell those homes, does not have to disclose it to the homeowners, but then when the home is resold it does have to be disclosed. Is that correct?

Mary Ann: I'm not exactly sure, but I can't imagine a scenario where it wouldn't have to be disclosed by the developer, but then it would have to be disclosed consequently because how would the subsequent owner know. There is, under the Pennsylvania Hazardous Substances Act, a requirement to put in your deed if your property has been the depository of hazardous substances. However, I'm not quite sure under Act II, what you do under Act II is you remediate to the level of use of the property. If you're going to use the property for residential, you remediate to those standards. If you're going to use it for industrial, you remediate to those

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standards. And I'd have to crack a book to know whether Act II can absolve you from that hazardous substances notice.

Brian Nagle: I think also probably what you would see with regard to a development, in modern development with subdivisions, I would think there would be a requirement that there be some disclosure in the declaration of covenants. And, often times buyers of residential properties will say, I was never told about this. Well, it was in the hundred page document you got when you went to the trailer at the development site, so you did know about it.

Jane Shields: You pointed out a good example. Most people think of farm land as pristine, and there will always be a Phase I environmental study done of any piece of property that's been in agricultural use. Orchards especially, use a lot of pesticides, and also every farm has a dump. The question is what's in it?

Brian Nagle: And there was, in fact, a case, I think came out of the Federal District in the Middle District of Ohio, where the woman owned a farm and she just had regular agricultural use and her agricultural use did not contaminate the property. However, in the early years, before even the fifties, she allowed people to store things there and one of the things she allowed a certain individual to store there were barrels of hazardous waste. That site became a Superfund site and there was extensive litigation over the site before the SARA Amendment to CERCLA and before the real peak of the Brownfield Revitalization Act. So, certainly it can happen on a farm, land that you think is clean.

I was speaking before the question about the advantages for Brownfield in grants, government funding and tax relief programs. You have to determine if the property is a Brownfield site - if the property is already on the national priorities list, which is the list the federal government maintains of contaminated properties; if the property is already proposed to be on the national priorities list, or if the property is already subject to a consent decree within the realm of Superfund law, it is not a Brownfield. It can be a Brownfield where there is perceived contamination, not necessarily actual contamination, that has actually prevented developers or other people from buying the property. So that's one thing you need to make sure that if you think you're going to be able to take advantage of some of the benefits and the initiative of the Brownfields Revitalization Act, that the property you want to purchase would qualify as a Brownfield.

One of the other advantages that I wanted to mention about a Brownfield and this would not necessarily go to the farmland that we were talking about, but more of the properties that are already urbanized or quasi-urbanized areas, you're going to find that there is already infrastructure there. Utility and possibly reusable buildings and it looks like in this case you may have a reusable building, so that can be an advantage.

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Mary Ann had mentioned Act II. Part of this process is getting an Act II certification from the Pennsylvania Department of Environmental Protection. Act II contains extensive requirements that have to be met in order to get that certification and it has been difficult for developers in the past. Now, on September 30th, Governor Rendell announced that developers will be able to obtain federal approval through the Act II process as part of a continued effort and, as I mentioned before, Pennsylvania's real initiative to streamline and make effective the Brownfield Revitalization program. AS part of that announcement, Governor Rendell announced that there is a memorandum of agreement with the federal government that provides for that. When you go through the Act II process, you're really knocking out a lot of what you need to do to get approval from the federal government. So, that's a good thing. It's really a new agreement, a new part of the process and we'll have to follow that to see how it actually works. People are positive about it though.

Finally, and I appreciate you all being here with us today. You could have been in Denver at the National Conference for the Superfund. The EPA today is issuing a rule that will set forth the new approach that will be used to facilitate a real release from CERCLA liability. Despite Brownfield Revitalization Act, there's still a lot of uncertainty and discomfort with the CERCLA liability and the federal government is trying to address that as the state government has tried to do. So those are some of the issues we'll see with the contamination issue in this case.

Question: Are there other needs for protection under the Act II for lenders with regard to CERCLA liability?

Brian Nagle: I can speak to the lender. When you are a mortgagee of the property that has contamination or is found to be a Superfund site, you can foreclose on that property for the purpose of protecting your loan. You cannot foreclose on that property to become the owner of the property and take advantage of the property to recover some of the money you had out on the mortgage that maybe you haven't been able to recover. Often times where the federal government has identified the site as a Superfund, they found the people who did it, they experienced sanctions from the federal government, maybe have paid out extensive amounts of money or wound-up their corporation for business and no longer have anything left to pay your mortgage, if you try to use the property in that way, you will become liable under CERCLA. If you simply just turned the property over, foreclosed and turned it over, and cooperated, again, the dialogue with the government in all of these properties, then you'll be okay with them on the liability.

Jane Shields: You point to the difficulty...you work with DEP and they say, you're fine, we release you. But the federal government still hangs out there. The EPA. There's the issue. You have to get releases from both. And today's new rule, which I don't think any of us have read yet, and regardless we don't know how it will be implemented, is an effort to coordinate the

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federal and state releases, which has been a problem up to now. You're right. That liability has still been hanging out there, but we're hopeful that this new regulation will really work. This idea, this program, to make it clear when you get a release, you're really released at both the federal and state level.

Question: _____ CERCLA always apply _____ designated as a Superfund site?

Jane Shields: No. It also applies to properties that could be, because it also incorporates RCRA, which is a different federal statute than CERCLA. Under the umbrella of CERCLA are a lot of different programs and so we refer to CERCLA, but it can be RCRA and RCRA applies when CERCLA may not. Then you also have petroleum; the major refiners managed to get petroleum carved out of Superfund liability, but it's still a huge source of liability. All the gas stations there have been around the country. All the water that has been contaminated. That's another whole issue, but the state, under the Clean Streams Law, and the federal government, under the Clean Water Act, have input there and Act II does come into play with that kind of liability as well.

Question: That protection that Brian referred to for lenders probably _____ you're not going to get anyone to buy it. To assume that kind of liability anyway.

Jane Shields: That's been a problem. Orphan properties. There are orphan properties out there.

Question: From a buyer's and seller's prospective, _____ due diligence, _____ environmental studies, something that when you buy a piece of property I should either pay for myself or demand that the sellers do or complete at their expense, and if I do that, will that give me reasonable protection that the property I'm buying is not going to have these issues. Or, if I'm the seller of the property, get it done before I go to market the property so from a marketability standpoint I already have this done to give you some piece of mind?

Mary Ann Rossi: Yes. In any real estate transaction of any substance there should be a Phase I Environmental. However, it's gotten - whether you do it as part of your due diligence, whether the seller does it as part of their marketing of the property, and the Phase I will give you a comfort level that it is highly unlikely that your property has any of these contamination problems.

Question: Who normally would do that in a transaction?

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Mary Ann Rossi: Typically, in my experience, the buyer does that as part of their due diligence, but since the contract is a matter of negotiation, it's whatever you can negotiate between the buyer and the seller.

Question: Would you consider that on a residential piece of real estate you're going to hold for rental or just on commercial?

Mary Ann Rossi: It's more commercial, but it depends on the circumstances. If it's a residential property that's next to an old paper mill, I might get a Phase I. It depends on the situation.

By now you're probably regretting falling in love with your property, but don't regret it because these things are happening all around us. The Brandywine Paper Mill is being redeveloped in the Borough of Downingtown. The Foote Mineral Site in East Whiteland is being redeveloped. It's not a matter that these projects or these problems are so overwhelming that you walk away from the transaction, it's a matter of managing your expectation. If your expectation is that your bed and breakfast is going to be open in six months, then we're here to tell you that's not a reasonable expectation. But, we are also here to tell you that other building developers have achieved these goals and if we take the right steps, we may be able to get you your bed and breakfast.

The last feature of the site we want to talk about is the Flood Run Creek. And that's really, face it, be truthful with me, that's why you fell in love with this property. I drove by the property the other night and the Flood Run Creek is beautiful and the pond is just a knockout and it is a really, really nice setting. That Flood Run Creek is an amenity and it's a challenge. It's a challenge from two perspective. It's a challenge first because of what we call a sensitive site feature and that is that the stream itself has floodplain associated with it, and flood plain is simply a part of the land near the stream that floods in a storm event. FEMA, who has gotten such good publicity lately, has mapped all of the waterways in the country and has designated their associated floodplain. Some of the FEMA mapping is based on actual testing or actual studies and is very accurate. Some of the FEMA mapping is based on a fly-by and is inaccurate. So if the Flood Run Creek has a horrible impact on your property in terms of taking away developable land, we may be able to do a study and do an accurate floodplain for this property and it may be less than the FEMA floodplain, because when FEMA, as with all of us, guesstimate, we usually err on the side of making it larger rather than smaller.

The zoning ordinance generally will not let you consider the acres that are part of the floodplain as part of your developable land. So we have a ten acre site here. If we have three acres of Flood Run Creek and it's associated floodplain, we only have seven net acres that we can consider our developable acres, so our lot coverage, all those area and bulk regulations that Brendan was talking about, they will be calculated on seven acres, not on ten.

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Another issue we might have with the Flood Run Creek is called the Riparian Buffer. The Riparian Buffer is the area close to the stream where the water is traveling overland to get to the stream, and you may have noticed as you drive around the county what I call the trees in tubes. Have you noticed those up on 322 by Brandywine Creek and down in the southern part of the county? Those are all part of efforts to improve the Riparian Buffer because our streams are being eroded and the streams are being eroded because the stormwater is coming in too fast. If we have a good Riparian Buffer, the water is slowed, gets to the stream at a slower rate of speed and it doesn't erode the stream banks.

Generally, many, many zoning ordinances have a setback from the floodplain and in other ordinances that setback is from the Riparian Buffer, which is going to push you even further back, and that tends to decrease the amount of your developable acres. So, you're going to need to know where that Riparian Buffer is and what the regulation of that buffer is. If your structure is already in the floodplain, that is another valid non-conformity that can be made, but you can't increase your encroachment into the floodplain. There are certain things you can do in the floodplain. You can put utilities. You may be able to put a driveway, but by and large the floodplain is going to be protected from any development.

Your goal of creating an amenity of the pond is going to spring some regulatory interest. You're probably going to have DEP and you might have the Corps of Engineers because where there is a stream and there's a floodplain, you're going to have wetlands, so you may have federal and state regulation of that amenity. What I'm going to recommend to you is a consultant who works in the design of naturalistic basins and we're going to find out whether or not we can turn that pond into a naturalistic basin which was the amenity, but would also take care of some of your stormwater runoff. We need to find out, at the outset, how much that amenity is going to cost you and whether or not you should get over your love of the pond and do something else. So, we want to assess that right up front so we don't get too far down the road.

The second thing that the Flood Run Creek presents to you is a challenge for your stormwater management, and I will tell you that stormwater management is the hot issue in land use law right now. One of the reasons that it's a hot issue here in our part of the world is that after years of drought, we suddenly enjoyed monsoon season every other weekend, and what that caused is every weakness in all of our stormwater management systems has been found out and highlighted and we know about it. I can't tell you how many calls we get about flooding, about runoff, about stormwater issues. In 1990, the federal government, under the Clean Water Act, required NPDES Permits, which are permits that regulate the quality of runoff. They required it for industrial and large construction projects. As of 1999, an NPDES Permit is required for smaller, and smaller is one to five acre projects. So, you're going to need an NPDES Permit for the quality of the runoff that is going to be produced from your property. And the EPA did something that's kind of interesting. This whole relation is a push-down. Virtually every municipality is enacting new stormwater management ordinances and the reason they are doing

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that is because the municipalities under the Clean Water Act are regulated by the EPA on the quality of the stormwater in their stormwater management system. So, in turn the municipality is pushing down on the property owner and saying, if you produce quality runoff that doesn't have any pollutants, our storm sewers are going to be in better shape. The other thing that the feds did that was interesting is they said, well, now that we have this new regulation, this new requirement for NPDES, we don't have the resources to go looking for everybody who has a construction project, so we'll go to the National Homebuilders web page and we'll pick the top 12, and we will regulate them to within an inch of their lives. And that's what they've been doing. The way that regulation occurs is that the EPA will visit your construction site and if you don't have your stormwater management devices in place, your riffraff, your silk fence and your bales of hay, whatever it is, they will cite you and they will fine you. The major builders have been having a lot of scrutiny of their construction projects. For those of us who are smaller than the top 12, that kind of regulation comes to us from DEP through the Chester County Conservation District. Now, the goals of all of this regulation are good goals. It prevents flooding; it decreases erosion and sedimentation and what Chester County has done is produce watersheds, which is a state of being for all of these streams and watersheds in the county, and it tells us what kind of shape Flood Run Creek is in. We look at this and Flood Run Creek is in pretty good shape. You can find out about the creek on your property, what watershed it's in, what kind of shape it's in and what the plans are to try and remediate this. The trees in tubes are partly the result of this kind of effort.

Question: I know locally Stroud Water Research and L&T National Land & Trust has done it, could you just speak briefly on PRAT, the southern states program, that actually pay the homeowners to plant the trees, and is that paid yearly?

Mary Ann Rossi: I've heard that, but I think I have someone in the audience who knows more about it than I do.

Audience Member: We have trees on our property that is actually in the program, run by Pennsylvania, and they do pay you on an annual basis for the use of the land for the term of the lease.

Jane Shields: You don't have trees in tubes do you? The reason I say that is actually it makes the tree weak, to keep it in a tube. It protects it against wildlife for a time when it's growing, but they want you to put it in a tube, but I wish they could be persuaded to go to a more advanced system because when that tube comes off that tree when it's more mature, it's not going to be in good condition.

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Audience Member: Part of the program is that you have to maintain it. You have to mow it twice a year, so when they drive by they know that you have the trees in tubes and also that, if they were not in the tubes, it would be much more challenging to go down and mow between the trees.

Jane Shields: If you wanted to go to the expense, they have an alternative, which is a grid that allows air to move through and allows more movement of the tree and still protects it from deer and mowing.

Mary Ann Rossi: So, during our land development process, we're going to have to look at stormwater management from three regulatory levels. We're going to have to look at federal, state and the municipality itself. Generally, the EPA and DEP make an effort to coordinate so that you're not getting different messages from different regulators about what to do with stormwater management, but everybody at every level is going to be part of the stormwater management. You have stormwater management during two phases. First is your construction phase and during your construction phase you're going to have exposed earth, and you're going to have to have facilities in place to prevent runoff. You're going to have the Chester County Conservation District coming and inspecting that. They're going to write little notices of their inspection. Sometimes they're going to write little violations on it. Don't ignore those. I can't tell you how many builder/developers I've had who have ignored those because seemingly nothing is happening. The inspector comes back again the next week and writes another one and nothing bad happens to the builder/ developer so the builder/ developer says, okay, Chester County Conservation District may be going to get mad at me someday, but they haven't done anything to me yet. What they're doing with those pieces of paper is they're bundling them up and sending them to DEP. When DEP gets enough of them, DEP is going to start an enforcement action and DEP is going to fine you. DEP starts to think about fines at about \$25,000. It's a nice round number. So, when you get those inspection reports and violations, put your riffraff back up, make sure that your subcontractor puts those devices back and that you don't get another violation the next time. It takes the state a while to get around to you, but they won't forget about you.

The second aspect of your stormwater management is now everything is in place and it's all constructed. The local ordinances, in almost every municipality, now require that you enter into a stormwater management covenant. These devices are not very good if you're not going to maintain them and there is now a post-construction stormwater management model ordinance that has been put out by the Chester County Water Resources Authority. So, gone are the days when the developer built the basin, installed the homes and went on to the next project, and the homeowners association knew there was a basin there, but didn't know very much what to do with it. After about 10-20 years, everything is clogged up and the basin overflows every rain storm. That is not going to happen in the future if the regulators stick to their guns on making

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sure that for every stormwater management device that we have, we have a responsible party appended to it by contract, so that the homeowners associations will have to inspect these basins, make sure that they're operating, and make sure the devices are doing what they are supposed to do. As I said just a few minutes ago, we might expect you as the client to say, I don't love the property anymore, guys. But, you won't say that because landowners and builder/developers are the most optimistic people on earth.

What I would like to ask Jane to do just in the last few minutes here, is tell you just a little bit about the land development plan approval process and we'll view that as a coming attraction for our next seminar.

Jane Shields: An applicant, that is a landowner or prospective landowner, somebody who has the property under agreement of sale, has to contact somebody to prepare a plan for them. It's usually a civil engineer. Sometimes it's someone with other kinds of credentials, but you're going to need a civil engineer involved, who looks at the zoning ordinance, looks at the subdivision and land development ordinance. Here it would be land development ordinance because a non-residential use as well would come into play. The engineer develops at least a sketch plan. Some municipalities want you to consult with them at the sketch plan phase, before you have a fully engineered plan and have spent a lot of money. That's a double-edged sword. If you really know what you want to do, it can just cost you more time and money to go through that sketch plan phase, but often it's helpful to get the municipality's read on what it thinks is important, whether it's the pond that you've fallen in love with, they also like and want to see as an enhanced amenity and stormwater control on the property. Whether the Historic Commission really is committed to the outline of the mill, whether it wants that facade to remain in place, those sort of issues.

After the sketch plan you go to a preliminary plan. You go to the municipality's planning commission first and the plan gets circulated. You will be stunned if you have never been through this process, at how many copies of a plan you need - 13, 15, 18 copies, goes to the township civil engineer, the township land planner. Here the township's historic consultant may get a copy also. It goes to the three, five, seven members of the planning commission; the members of the governing body; the code enforcement officer, the county planning commission; and that's where these DEP permits begin to come into play. It's at that preliminary plan stage you'll begin that state permit process. The county also weighs in, so there will be time spent waiting for comments to come back from all these different consultants for the municipality. That process, while in theory you can get through a preliminary plan in 90 days, is not going to happen. What, realistically, six months minimum?

Mary Ann Rossi: Six months minimum. Six to nine minimum.

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Jane Shields: And it can be two years to get through the process also realistically, if you have a lot of issues like this one. After the preliminary plan, it says its preliminary but it's not. You're really going to be doing almost all the work necessary to complete your ideas and plans for the property at the preliminary plan stage. The final plan will be the finishing touches to such things as stormwater control, maybe the final Historic Commission review, maybe the color of the façade, the paints, the roofing materials, things of that nature. But, the preliminary plan is really the meat of the application process. You'll get through the state approvals you need at the end of that point. You'll know where you are. It's a team effort. You're going to have an engineer, here you're going to have a historic consultant, an environmentalist. You may have a hydrologist involved. All sorts of people, and they all need to be coordinated and communicate to get your project moving forward. And that coordination is sometimes done by the lawyer, sometimes by one of the engineers, and can be done by an architect. That coordination is key and communication.

Mary Ann Rossi: And once you have your preliminary plan approval, you have a vested right to have a final plan approved based upon the same conditions as your preliminary, so a preliminary plan is a bankable approval. That doesn't mean that the bank will give you money, it means they do have a legal right to have a final plan approved.

Question: Are there any instances where projects, you don't have all these issues, but you still don't get immediate approval for whatever reason?

Mary Ann Rossi: That happens and sometimes that happens because of local politics. Sometimes it happens because there's an issue with the property that is a perceived issue on the part of the municipality and sometimes those cases can be very difficult. Generally speaking, most municipalities follow the applicable ordinance and you get what you're entitled to. Sometimes you have to fight for it.

Brendan Burke: We had some fun putting together this fact pattern. We sat down one afternoon and threw out a bunch of things, everything short of "there's a duckbilled platypus on this property," and to a certain extent, you're not going to find many properties that have this many issues, but sometimes you do and you will. A lot of this was an amalgamation of all our experiences - what we've run into lately and what we think is important. It comes across as a bit of a cautionary tale today because I'm sure you feel like walking out today thinking, okay, note to self, never develop anything in Chester County. That's not the case and there are builder/developers in here who will tell you that and they will tell you that, with the pace of development and the desire for development, a lot of times the property that's available was a manufacturing facility. And maybe you don't want the person to put in a Koi pond there, for example, but these are the kind of things you'll run into. You wouldn't normally run into every

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single one of these at the same time, but what Jane said and what we've all talked about is the idea of planning. Our builder/developer clients are people who are go-getters. Time is money. That's the same way for all of us. To a certain extent you need to reign-in that expectation because I wish I could tell them, two and a half months, you're going to be selling goods. It doesn't work that way, but oftentimes you don't run into quite as many things as are going on here. With that, I'll let our chairperson, Mary Ann Rossi, select our winner.

Mary Ann Rossi: Thank you all.